INDEX

PAGE

HISTORY 1

STATEMENT OF FACTS 2

ARGUMENT: 5

First: An Individual Owner of a Truck is an Independent Contractor When Operating Under the Franchise Permit of a Motor Vehicle Carrier 5

Second: A Motor Vehicle Carrier is Only Responsible for the Acts of Such Broker-Independent Contractor While He is Engaged in Motor Transportation Service for Such Carrier 6

Third: An Individual Owner of a Truck Hired to Haul Coal for a Motor Carrier From a Mine to a Mill on a Tonnage Basis is Not Engaged in Motor Transportation Service for the Carrier While Driving His Truck From His Home to and From His Place of Employment 6

Fourth: The Individual Owner of a Truck is a Private Carrier as Defined by the Federal Statutes and Subject to the Act Only With Respect to Safety of Operations, Hours of Service of Employees and Standards of Equipment 7

CITATIONS

Cases:

Behner v. Industrial Commission of Ohio, 154, Ohio St., 433; 96 N. E. (2d), 403 6

Costello, Admx. v. Smith, 7 Federal Carriers Cases, 2272, decided January 19, 1950; 179 Fed. Rep. 2d, 715 ..... 7, 8

Duncan v. Evans, 135 Ohio St. 486; 17 N. E. (2d) 913 6

PAGE

Harrison v. Greyvan Lines, Inc., (C. C. A., 7), 156 F. (2d), 412, 331 U. S. 704), 91 L. Ed. 1757 ..... 5, 7
Simon v. McCullough Transfer Company, 155 Ohio St., 104; 98 N. E. (2d), 19..... 6, 7 & 8

IN THE

Supreme Court of the United States

October Term, 1951

No. 680

SAMUEL W. WINGER, Administrator of the Estate of Samual W. Winger, Jr., Deceased, *Petitioner,*

v.

McCULLOUGH TRANSFER COMPANY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HISTORY

The petitioner recovered a judgment in the Common Pleas Court of Mahoning County, Ohio, in the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00). The Court of Appeals of the Seventh District of the State of Ohio rendered final judgment for the respondent. The petitioner filed a motion to certify in the Supreme Court of Ohio which motion was denied and the Supreme Court of Ohio made the following entry in the case reported in *156 Ohio St., at Page 394:*

> "It is ordered and adjudged, sua sponte, that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved."

The petitioner has now filed a petition for a writ of certiorari in this Honorable Court.

STATEMENT OF FACTS

The McCullough Transfer Company was engaged in hauling coal from two mines in Pennsylvania to plants of The Youngstown Sheet & Tube Company in the Youngstown, Ohio district. They engaged fifteen to twenty coal dump truck owners to haul this coal from these strip mines on a tonnage basis. Some of the truck owners lived in Ohio and some in Pennsylvania. Each owner maintained his own truck. The McCullough Transfer Company was a duly licensed P.U.C.O. and I.C.C. carrier.

On Friday, January 16th, 1948, Charles Bolton was so engaged in the hauling of coal with his Mack dump truck from a mine of The Buckeye Coal Company operated by the Interstate Construction Company near Grove City, Pennsylvania, to the Rod and Wire Plant of The Youngstown Sheet & Tube Company at Struthers, Ohio, a distance of between thirty and thirty-five miles. He was paid $1.20 per ton for coal so hauled. There was no written lease or other arrangement for pay except the $1.20 per ton. He was furnished with a P.U.C.O. and I.C.C. permit of the McCullough Transfer Company. He had no permits of his own. There was no restriction against Bolton's hauling for others if he so desired.

Between three and four o'clock on the afternoon of that day he got his last load at the mine where Samuel Winger, (the father of Samuel Winger, Jr., the de-

cedent), worked as a loader and Samuel W. Winger, Jr., as the oiler, and Bolton's truck was driven to the office of the mine, about a half mile from the pit where the truck was loaded. His truck was the last truck loaded that day and the mine closed until the following Monday.

As Bolton appeared at the office it was apparent that he was intoxicated and unfit to drive his truck. Homer Zook, a dispatcher and employee of the McCullough Transfer Company, was at the office of the mine and would not permit Bolton to continue driving his truck. At that time Samuel W. Winger, Samuel W. Winger, Jr., Homer Zook, Bolton, Joseph Ketler, a mine worker, and another broker, John Edwards, were present. Samuel Winger and Ketler testified that Zook requested that Samuel W. Winger, Jr. drive Bolton's truck. Both John Edwards and Homer Zook testified that Samuel W. Winger, Jr. volunteered to drive Bolton's truck. In any event, with Zook's consent, without anything said about pay, Samuel W. Winger, Jr. left the office of the mine driving Bolton's truck, Bolton sitting on the front seat of it. Edwards, the other broker, with a load proceeded on ahead of Bolton's truck.

When they got to the Rod and Wire Plant of The Youngstown Sheet & Tube Company at Struthers between five and six o'clock, Samuel W. Winger, Jr. relinquished the wheel and Bolton drove his truck into the plant where it was unloaded.

Bolton, Samuel W. Winger, Jr. and Edwards had some conversation there and these three men then proceeded out of the plant of The Youngstown Sheet & Tube Company where they turned left, or west, and traveled about a mile to Campbell where they stopped at the Gridiron Cafe.

Bolton drove his own truck to this cafe with Samuel W. Winger, Jr. riding with him and Edwards drove his own

truck. They stayed at the Gridiron for about a half hour, had some drinks and then started for home, Bolton insisted upon driving. Edwards lived in New Castle; Bolton at Sharpsville. Edwards drove ahead. Bolton followed. They reached Route #422, drove east on Route #422 and when Bolton arrived at Coitsville where the Coitsville-Hubbard Road intersects Route #422, Bolton attempted to make a left turn in front of a west bound automobile with which he collided. Samuel W. Winger, Jr. was thrown out of the truck and received injuries which resulted in his death.

The accident happened around seven o'clock in the evening at a point three or four miles from the plant where the coal was delivered and after the driver had made a detour for a mile to a cafe. At the time the accident happened the truck still bore the P.U.C.O. and I.C.C. permits of the McCullough Transfer Company.

At the time the accident happened Bolton was turning from the road that would lead back to the mine onto a road which would take him to his home in Sharpsville.

The coal was weighed outside the mill, a copy of the weigh bill was furnished the Accounting Department of The Youngstown Sheet & Tube Company from which a freight manifest was prepared and delivered to the McCullough Transfer Company to enable the McCullough Transfer Company to bill The Youngstown Sheet & Tube Company and to pay the truck owner. The truck owner, or driver, also retained a copy of this ticket or weigh bill to enable him to check and see that he received full payment for the coal which he hauled,—this copy he might turn in later at the mine or to the McCullough Transfer Company.

ARGUMENT

First: An Individual Owner of a Truck Is An Independent Contractor When Operating Under the Franchise Permits of a Motor Vehicle Carrier

Harrison v. *Greyvan Lines, Inc.*, (C.C.A., 7), 156 F. (2d), 412, 331 U. S., 704, 722) 91 L. Ed., 1757, 1764, Opinion delivered by Mr. Justice Reed

"There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. . . .

". . .

"These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

". . .

". . . we agree with the decision below . . . that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the con-

trol exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Behner v. *Industrial Commission of Ohio, 154 Ohio St., 433; 96 N. E. (2d), 403,* cites and follows with approval the foregoing decision of the Supreme Court of the United States.

Second: A Motor Vehicle Carrier is Only Responsible for the Acts of Such Broker-Independent Contractor While He is Engaged in Motor Transportation Service for Such Carrier

Duncan v. *Evans,* 135 Ohio St., 486; 17 N. E. (2d), 913

"Apparently the legislature (of Ohio) intended to protect the public against loss from negligence on the part of any one using the highway in the business of transportation by motor truck."

Simon v. *McCullough Transfer Company,* 155 Ohio St., 104 at 110; 98 N. E. (2d), 19 a

Third: An Individual Owner of a Truck Hired to Haul Coal for a Motor Carrier From a Mine to a Mill on a Tonnage Basis is Not Engaged in Motor Transportation Service for the Carrier While Driving His Truck From His Home to and From His Place of Employment

It should be noted that a companion case brought by a member of the public against this respondent arising out of this same accident was decided by the Supreme Court of Ohio. It is the case of *Simon* v. *McCullough Transfer Co., supra.*

SYLLABUS:

"A common carrier of freight by motor vehicle, who possesses a certificate issued under Part II of the Interstate Commerce Act and employs an independent contractor, who does not possess such a certificate, to transport interstate freight in such independent contractor's truck carrying the permit plates of the common carrier, is not liable for an accident caused by the negligence of the independent contractor driving his own truck where, at the time of such accident, the independent contractor had entirely completed the transportation for the common carrier, had no further obligation or duty toward such common carrier and was driving the empty vehicle entirely under his own direction and control at a point distant from the location where he had completely unloaded the freight which he had been hired to transport."

Costello, Admx. v. *Smith,* 7 Federal Carriers Cases, 2272, decided January 19, 1950; 179 Fed. Rep. 2d, 715

Fourth: The Individual Owner of a Truck is a Private Carrier as Defined by the Federal Statutes and Subject to the Act Only With Respect to Safety of Operations, Hours of Service of Employees and Standards of Equipment

Costello, Admx. v. *Smith, supra*

We respectfully direct the court's attention to the facts in the instant case as set forth in the opinion of the Court of Appeals of the Seventh District of Ohio, and as further related in detail in the companion case of *Simon* v. *McCullough Transfer Co., supra.*

We further submit to the court the opinion and decision of the Court of Appeals of the Seventh District of Ohio in the instant case, and also the finding and opinion of this Honorable Court in the case of *Harrison* v. *Greyvan*

Lines, Inc., supra, and also the decisions of the courts in the cases of *Costello, Admx.* v. *Smith* and *Simon* v. *McCullough Transfer Co.,* supra.

The legal status of the decedent on the broker's truck at the time of the accident could not be higher than an invitee to whom ordinary care would be owed, but the Ohio Supreme Court held that the respondent was not responsible in this accident to a member of the public to whom the same duty was owed. *Simon* v. *McCullough Transfer Co., supra.*

Assuming that the decedent was placed on the broker's truck by a duly authorized employee of the respondent to drive the truck because the regular driver and owner was intoxicated, the decedent lost any right which he might have had to be on the truck at the time of the accident when he relinquished the wheel of the truck to the intoxicated owner, abandoned his job and departed from his agency. See Opinion of the Court of Appeals of the Seventh District of Ohio.

The foregoing clearly shows that there is no liability upon a motor carrier for the operation of the truck of an individual owner when his work is completed for the carrier and he is engaged in driving his truck to his own home. And further, that there is no Federal or State statute nor any ruling of the Interstate Commerce Commission placing liability upon a motor carrier for such operation of a truck by an individual owner thereof.

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari filed by the petitioner herein should be denied.

Respectfully submitted,

WILLIAM E. PFAU &
WILLIAM E. PFAU, JR.

RICHARD W. GALIHER,
Attorneys for Respondent.